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A Mediator’s Settlement Proposal: Proceed With Caution

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If you are new to mediation, you may not be familiar with a mediator’s settlement proposal (MSP). But, even if you are generally familiar with an MSP, you may not have taken the time to consider all its nuances. Hence, the warning to proceed with caution when considering an MSP.

For those of you not familiar with an MSP, let me explain what it is. Where parties to a mediation have reached an impasse in negotiations, often one of the parties will ask the mediator—or the mediator will suggest—that the mediator provide the parties with their recommendation for terms for settlement. This is generally referred to as an MSP. Once proposed, the parties then simply advise the mediator whether they accept the MSP. If all parties to the mediation accept the MSP, a settlement is reached. If one or more parties reject the MSP, the mediator advises the parties there is no settlement.

While this all sounds rather simple, there are a number of considerations to evaluate before asking a mediator to make an MSP.

Understand, the parties are under no obligation to ask the mediator to make an MSP if the parties have reached an impasse in negotiations during a mediation. Like mediation itself, requesting an MSP is purely voluntary. All parties must agree to ask the mediator to make an MSP. One cannot be forced to agree to have a mediator provide their MSP. Nor can a mediator unilaterally impose an MSP on the parties. As discussed below, there are valid reasons why you may *not* want to ask a mediator for an MSP.

One might ask, then, what harm is there in asking the mediator to make an MSP? To answer this question, let’s discuss what factors to consider prior to asking the mediator to make an MSP.

Before resorting to a last-ditch effort to settle the case by asking the mediator to make an MSP when impasse has been reached, carefully consider whether, in fact, negotiations have reached a true and final impasse. An MSP is a useful settlement tool, but it should not become a settlement crutch. The parties and the mediator should truly exhaust negotiations before asking the mediator for an MSP. Too often parties request the mediator to make an MSP because they are frustrated with the progress in negotiations, are tired of the process, or are simply at the end of the day and a settlement has not been reached. An MSP is more likely to be successful the closer the parties are in their negotiations when impasse is reached.

Furthermore, the more terms for a settlement the parties can successfully negotiate before asking the mediator for an MSP also increases the chance for a successful MSP. In other words, the fewer issues the mediator must address in their MSP, the more likely a settlement will be agreed to.

Consider as well how the mediator will determine their MSP. Not all mediators arrive at their MSPs the same way. There are two common ways mediators determine their MSPs:

- Some mediators arrive at their MSP based on their own experience and evaluation of the parties’ case. Stated differently, these mediators base their MSP on what they think are fair settlement terms.
- Other mediators base their MSP on their assessment reached during the mediation as to terms they believe have the best chance of being accepted by all parties.

It is important to understand how a mediator will make their MSP before agreeing to request one. In the first scenario, where the mediator will make their MSP based on their own experience and view of the case, careful consideration should be given whether you are comfortable with this approach. This is something you should always consider when evaluating who will mediate your case. Often parties get too comfortable using their “go-to” mediator in all their cases without evaluating the mediator’s experience and approach to mediation. Failing to carefully vet your mediator can lead to unforeseen consequences during the mediation. This can be disastrous when the mediator will make their MSP based upon their experience. The chances of getting a fair MSP is greatly enhanced if the mediator is experienced with the specific issues in your case or has demonstrated during the mediation a clear understanding on the issues in dispute. Conversely, if the mediator has little or no experience with the issues in your case, lacked clear understanding of the issues in dispute during the mediation or signaled disagreement with your settlement position during the mediation, you are less likely to get an MSP that will be acceptable to you.

In the second scenario, where the mediator will make their MSP based solely on what they think are the terms all parties are most likely to accept, understand you sacrifice significant control over what the MSP might be. It is a mistake to assume that all mediators will simply “split the baby” with their MSP between the last offer and the last demand. In fact, the mediator is under no constraints with this approach to split the baby. You may get an MSP for the last offer the other party or parties have made—or something less than a meeting in the middle.

Before agreeing to an MSP, it is always a good idea to inquire how the mediator will arrive at their MSP. You should decide which of the above two options you are comfortable with given the specific facts and circumstances of your case.

It is also important to make certain you understand what terms the mediator will address in their MSP. There is nothing prohibiting you from setting the parameters for the MSP. For example, the parties can request the mediator only address specific issues in dispute but not all issues. Resolving some issues in dispute can then lead to further negotiations of remaining issues in dispute, giving you more control over the ultimate settlement outcome.

Also consider the consequences of requesting an MSP where one or more parties rejects the proposal. Have you now set the floor or ceiling for future settlement negotiations? If mediation takes place early in your case, you may not want to ask for an MSP for this very reason. Consider whether it may be better to conduct further investigation and discovery and return for a second mediation, where you will not be as constrained in negotiations by a previously un successful MSP.

Finally, a word of caution before requesting an MSP. Be aware that an MSP has now also become a strategic weapon for some lawyers who approach mediation with the strategy of negotiating the best possible terms, then declaring an impasse and suggesting the parties agree to an MSP. Their rationale for this approach is that they hope in the end to get a better settlement than what they can negotiate during the mediation, rightly anticipating the mediator is likely to provide his or her MSP somewhere in between where the parties reached an impasse in their negotiations.

This approach is particularly effective when that party has actual or perceived superior negotiating power. If this is a concern going into a mediation or appears to be the end strategy during the mediation, you can at least try to negate this strategy by declaring at the start or during the mediation that you will not agree to request an MSP if a settlement is not negotiated during the mediation. You can always reverse course during or after the mediation if circumstances indicate these concerns are not real.

In summary, an MSP is a useful settlement option when impasse is reached during a mediation. But careful consideration should be given before agreeing to request an MSP.

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